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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 405

M. ROBERT GUGGENHEIM,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

ERRETT G. SMITH,
Counsel for Petitioner.

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Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The Petition of M. Robert Guggenheim, of Washington, D. C., respectfully represents to this Honorable Court that, on June 28, 1948, the Court of Claims of the United States overruled the motion of this petitioner, plaintiff therein, for a new trial and for amendment of findings; that a writ of certiorari should be issued out of this Court to the said Court of Claims, to the end that there be certified to this Court the requisite proceedings for review of that Court's action in the case; and, therefore, petitioner respectfully shows to this Honorable Court:

I

Statement of Matter Involved

Petitioner was before the Court of Claims seeking to recover income taxes which he believes he has overpaid for 1938 and 1939, the Bureau of Internal Revenue having

rejected his claim for refund of such taxes. The basis of the claim is the remedial provisions of the 1942 Revenue Act, allowing, as non-trade or non-business expenses, certain payments pertaining to the production or collection of income or to the management, conservation, or maintenance of property held for the production of income.

Respondent, through the Bureau of Internal Revenue, previously had disallowed the same expense items, which petitioner had claimed on his income tax returns as business expenses. It made no claim that the expenses were not reasonable nor that they were not actually expended; but based its disallowance of them primarily on the ground that the taxpayer was not "engaged in business" and hence not entitled to the deductions claimed .

Prior to the Bureau's disallowance of the items as business expenses, the usual formal conferences were held, one in the office of the Internal Revenue Agent in Charge, in Washington, D. C., and another before the Technical Staff of the Bureau, in Washington. Following this latter conference, petitioner signed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax," its date being May 6, 1941. This was a waiver of his right to go to the Board of Tax Appeals, now the Tax Court.

Respondent added two paragraphs to the usual form of such waiver; and struck out a part of a sentence in the footnote, below a black line, at the bottom of the waiver. Neither the waiver, nor any part of it, was approved by "the Secretary, or the Under Secretary of the Treasury, or [of] an Assistant Secretary of the Treasury" (Int. Rev. Code Sec. 3761). The two added paragraphs were added solely by the respondent and by it alone, without any consultation or agreement in advance by petitioner. The text of them appears at the Court of Claims' Special Finding of Fact No. 6. (R. 12-13)

These added paragraphs (a) *were* "a part of the printed

form"; (b) they *were not* "typed on the form by the parties"; and (c) they *were not added* "after an agreement was reached on the issues in controversy." There never was any such "agreement" in the nature of a closing agreement or a compromise agreement, as the above phrase, from Finding No. 6, would imply, when read along with the added paragraphs.

It is true that these controversial paragraphs of the waiver were printed in a different manner and at a different time from the original and main body of the form. These paragraphs, along with several items at the top of the form, were printed either by mimeograph or by the multi-lithographing process (as shown by the off-set or penetration of ink through the original form to the reverse side of the paper, where it appears with a greenish-gray tinge rather than jet-black); and were added, in or about the month of "June 1940" (nearly a year *before* the Technical Staff conference—about May 1, 1941—whereat the Government is pretending an agreement to compromise was reached), by or for the Technical Staff, as the upper left corner of the form shows; the original print of the form having been "Revised April 1939," as shown by the date stricken out in the same corner.

In clarification of the form in which some of the testimony appears in the Transcript of Record herein, it should be explained that, prior to a conference in the trial Court to settle the record in this case, there was a misunderstanding, at least on the part of petitioner's counsel, to the effect that the Court had not considered certain proffered testimony, which the trial Commissioner had ruled inadmissible as evidence, but which had been included, at the end of the transcript of testimony, in the form of a proposal of proof. It now is understood that the Court of Claims, in making its findings, in deciding the case, and in writing its opinion, did consider this proffered testimony just as though it had

been in evidence; although neither the findings nor the opinion so stated nor made that idea apparent. It is understood, also, that an appropriate entry will be made, in the order settling the record, to the effect that this proposal-of-proof testimony was considered by the Court of Claims.

The trial Court's opinion does not discuss the matter of Section 121 (a) (2) of the 1942 Revenue Act being a remedial, curative, or relief statute, allowing taxpayers non-trade or non-business deductions for expense payments of the type here involved; although the opinion casually mentions the section at three different points: (1) middle of page 13; (2) last paragraph on page 14; and (3) top of page 15 of pamphlet copy. (R. 22, 23.)

II

Relevant Parts of Statutes Involved

Internal Revenue Code, Section 272(d); Title 26 U. S. C. Section 272(d); Act of May 28, 1938, c. 289, Sec. 272, 52 Stat. 535:

> "Sec. 272. Procedure in general
>
> "(d) *Waiver of restrictions.* The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

Internal Revenue Code, Section 3760; Title 26 U. S. C. Section 3760; derived from several earlier Revenue Acts, including 1924 Act, Section 1006, the later amendments being by Act May 28, 1938, Sections 801, 802, 52 Stat. 573; and by Act February 10, 1939, c. 2, 53 Stat. 462:

> "Sec. 3760. Closing agreements
>
> "(a) *Authorization.* The Commissioner (or any officer or employee of the Bureau of Internal Revenue,

including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

"(b) *Finality.* If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

"(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

"(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded."

Internal Revenue Code, Section 3761(a); Title 26 U. S. C. Section 3761(a); derived from R. S. Section 3229 through several amendments, the later amendments being by Act May 28, 1938, c. 289, Section 815, 52 Stat. 578; and by Act February 10, 1939, c. 2, 53 Stat. 462:

"Sec. 3761. Compromises

"(a) *Authorization.* The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense; * * *"

Revenue Act 1942, Section 121(a)(2), (d), and (e), c. 619, 56 Stat. 798; Internal Revenue Code, as amended, Sec-

tion 23(a)(2); Title 26 U. S. C. A., pocket suppl., Sec. 23(a)(2); and, for subsections (d) and (e), see the 1942 Rev. Act, in U. S. C. A., vol. "Internal Revenue Acts Beginning 1940", pp. 187, 188:

"Sec. 23. *Deductions from gross income.* In computing net income there shall be allowed as deductions:

"(a) Expenses.

• • • • • • •

"(2) *Non-trade or non-business expenses.* In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

• • • • • • •

"(d) *Taxable years to which amendments applicable.* The amendments made by this section shall be applicable to taxable years beginning after December 31, 1938.

"(e) *Retroactive amendment to prior revenue acts.* For the purposes of the Revenue Act of 1938 or any prior revenue Act the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such revenue Act on the date of its enactment."

III

Questions Presented

1. Are not the decisions of this Court, in effect, ignored, or at least "not given proper effect", when the Court of Claims by-passes the true and main point of the decision; and, instead of applying the decision, exalts a safety remark as to "estoppel" which the Court's opinion made to take care of a possible future unusual case—and even inac-

curately applies the principle of that remark? (This question refers to the Court of Claims' quotation, at middle of page 17 of pamphlet copy of its opinion, from the case of *Botany Worsted Mills* v. *United States*, 278 U. S. 282.) (R. 26)

2. Where the Court of Claims thus attempts to bring a case within a possible exception, suggested by this Court to an important general rule of law, do not a proper functioning of our system of justice and a due regard of this Court for its own standing, both require careful scrutiny of the case, *by this Court*, to determine whether the Court below really has found a case of the unusual type suggested by what we might call the 1 per cent exception; or whether this case is not rather one of the 99 per cent wherein the decision of this Court should be applied without cavil? If the Court of Claims has done what we here indicate (i. e., has improperly treated a case as being within a rare exception to a general rule, declared by this Court and thereafter followed by several Circuit Courts) is that not a departure "from the accepted and usual course of judicial proceedings"?

3. Is not the decision of the Court of Claims, in this case, in conflict with decisions, on the same matter, of several Circuit Courts of Appeals, when it goes counter to the portion of the 6th Circuit Court's statement in its decision of *Joyce* v. *Gentsch*, 141 F. (2d) 891, to the effect that:

> "Upon the principle of the *Botany Mills* case, the consent of the Secretary of the Treasury has been considered by circuit courts of appeal as essential to the validity of a stipulation concerning tax liability, where such stipulation is in the nature of a compromise." (citing four cases in support) *Joyce* v. *Gentsch*, 141 F. (2d) 891, 895?

The four decisions cited, together with the *Joyce* case, constitute five cases from four different circuits. Such four cases are:

Brast v. *Winding Gulf Colliery Co.* (C. C. A. 4) 94 F. (2d) 179;

Hughson v. *United States* (C. C. A. 9) 59 F. (2d) 17, 19;

Anderson, Collector of Internal Revenue v. *P. W. Madsen Inv. Co.* (C. C. A. 10) 72 F. (2d) 768, 770;

Schneider v. *United States* (C. C. A. 6) 119 F. (2d) 215, 217.

IV

Errors Assigned

1. The Court of Claims, in this case, erred:

(a) In finding that the two paragraphs, in the waiver, defendant's Exhibit 5, preceding plaintiff's signature, "were not a part of the printed form"—apparently meaning prior to the time (supposedly at the Technical Staff conference) when the parties purportedly agreed to the substance of these two added paragraphs;

(b) In finding that these two paragraphs "were typed on the form by the parties"; and

(c) In finding that such alleged typing was done "after an agreement was reached on the issues in controversy"—obviously meaning an agreement in the nature of a compromise.

2. The trial Court erred in making any and all of its findings of alleged facts tending to indicate—and in reaching any conclusions to the effect—(a) that the plaintiff in any wise took the initiative; or (b) even took any part, in any plan or action (1) toward compromising this tax matter or (2) toward entering a closing agreement with the Government in respect to it, there being a lack of evidence of

record to sustain any and all of the trial Court's said findings or to support its said conclusions.

3. The Court of Claims erred in failing to make findings of fact on material issues to the effect: (a) That the plaintiff did not, at any time, make anything in the way of a compromise offer respecting these proposed additional taxes for 1938 and 1939; (b) That he did not, either at the conference in the office of the Internal Revenue Agent in Charge or before the Technical Staff of the Bureau, make any offer or proposal in the nature of a compromise offer as to these taxes; (c) That there was not in either of these conferences any element of trade or of offering to concede on some items if the other party would concede on others; (d) That—referring to the Technical Staff's letter of May 5, 1941, defendant's Exhibit 3, to plaintiff's attorney, and to the expression it contained: "Your proposal for settlement of the above-entitled matter has been accepted"—there was no such "proposal for settlement" made by the plaintiff in this case; and (e) That there wasn't anything in the nature of trading, or conceding, or relinquishing the several items between the representatives of the Bureau and the taxpayer; it wasn't a case of "We'll do this and you do that."

4. The Court of Claims erred in failing to make findings of fact on other material issues to the effect: (a) That agreement was reached, on the tax determining items in controversy between the taxpayer and the Government, by reason of the fact that he and his counsel, after conferences before the office of the Internal Revenue Agent in Charge and of the Internal Revenue Bureau's Technical Staff, early in 1941, determined that the law, as it then stood, was against them in respect to getting such items allowed as business expense deductions in determining taxable income, since, under principles set forth in a then recent Supreme Court decision, this taxpayer was not considered to have

been "engaged in business" in the taxable years 1938 and 1939; (b) That the Bureau had not questioned that the taxpayer actually had paid such items of expense, nor that they were ordinary and necessary expenditures in each case for the purpose claimed; but took the position that they were not proper business expense deductions since he was not "engaged in business"; (c) That there was no element of trade, or bargaining, or receding by either party in respect to the item of deduction, claimed from taxable income for a statutory, casualty loss in 1938, by reason of hurricane damage to an estate the taxpayer then owned on Long Island; the taxpayer's attorney, at the suggestion of the Bureau in Washington, having negotiated, as to the amount to be allowed for this loss, with the office of the Internal Revenue Agent in Charge in New York; and the attorney for the taxpayer, having come to the conclusion at the Technical Staff conference that the difference between them on this hurricane damage item was not worth litigating, suggested to the conferees that that would wind up the case; and (d) That neither the matter of the allowance of this casualty loss deduction, nor its amount, was in issue before the trial Court, that is to say, neither party contested the correctness of the amount which the Bureau, through the office of its Internal Revenue Agent in Charge, at New York, finally allowed for it.

5. The Court of Claims erred, likewise, in failing to find as facts (a) That, upon the taxpayer's attorney concluding that the hurricane damage item was not worth litigating and telling the conferees that that would wind up the case, they asked him if he would recommend to his client that he sign a waiver; and he said that he would because they were interested in stopping the running of interest; and the Technical Staff then prepared the waiver, sent it to the taxpayer's tax counsel, and the taxpayer signed it and returned it; and

(b) That, so far as the taxpayer's counsel knew, the filled-out waiver was not available at the Technical Staff conference; but that the conferees said they would send it to the taxpayer, that they would prepare the necessary papers and send them to the taxpayer for his signature.

6. The trial Court (a) further erred in failing to find as facts that the plaintiff did not take the inititive (1) toward giving or providing the waiver of May 6, 1941; or (2) toward obtaining any closing agreement on the taxes here in issue with the Government; or (3) toward compromising such taxes, or in any plan or action looking toward such a compromise; and (b) also erred in failing to find as a fact and to conclude that the plaintiff did not take any part in any plan for any of such acts or procedures, except merely the signing and returning of the waiver, the giving of which the Government suggested, and which it prepared and sent to him.

7. The Court of Claims erred in not finding (a) That there was no agreement at all of the nature which the Government is contending the waiver, in evidence in this case, constitutes, for the reason that the two added paragraphs are a nullity—in respect to effecting any possible "compromise"—because they fail to conform to the statutory requirement as to "compromises", i. e., they do not have the approval of the Secretary, or Assistant Secretary, or Undersecretary of the Treasury; and (b) That any words, suggesting a compromise or a proposal by the taxpayer to compromise his taxes—in the two added paragraphs of the waiver and the parts of Exhibit 3 (letter of May 5, 1941, at Ct. Cls. Special Finding No. 5) and Exhibit 6 (letter of May 7, 1941, at Ct. Cls. Special Finding No. 8), and other like communications—were merely self-serving declarations made by the defendant.

8. The trial Court erred in not finding (a) That the waiver here in issue was not intended as a "compromise" or as a

"settlement agreement"; (b) That the innuendoes—which the added paragraphs of the waiver, and other instruments or letters written by the Government, contained, intimating a "compromise" had been reached on the amounts of the taxes for the two years in issue—were merely self-serving declarations with no legitimate background or basis in the precedent facts; (c) That such amounts of tax to be paid were determined, by the Government's own calculations, after petitioner and his counsel had gone through the usual conference procedure followed in the Bureau of Internal Revenue and had concluded, during that process, that the law was against the taxpayer being allowed the claimed deductions as business expenses; and that the final difference between him and the Government on another item was not worth his while litigating; (d) That the taxpayer made no compromise offer or settlement proposal, at any time, to the Government; and (e) That there was no "compromise" or "settlement agreement" negotiated or discussed at any of the conferences which taxpayer and his counsel had with the Government's representatives.

9. The Court of Claims erred in not finding that the Government, itself, was guilty of "misrepresentation of a material fact" or facts which, under the specific terms of the Internal Revenue Code, Sec. 3760 (b), would have justified *the taxpayer* in reopening the case and, by a suit such as this one, in having the determination, assessment, and collection of the tax annulled, modified, and set aside—*even if* the purported compromise or settlement agreement had had the approval of the Secretary of the Treasury or his designated representatives; said misrepresentation by the Government having been that the taxpayer had made a proposal for settlement of the case and that there had been a "compromise" or "closing agreement" negotiated at the conferences; whereas neither of these misrepresentations was true in any sense whatsoever.

10. The trial Court (a) erred in concluding and holding that the plaintiff was precluded by the alleged "finality" of the so-called "compromise" or "closing agreement", contained in the waiver, from maintaining suit on his claims for the refund in issue here; and (b) also erred in concluding that this situation presents a proper case for application of the doctrine of equitable estoppel against petitioner.

11. The Court of Claims erred in not giving consideration and full effect, in its findings and decision in this case, to Section 121 (a) (2), (d), and (e) of the 1942 Revenue Act as a remedial, curative, or relief statute, allowing taxpayers non-trade and non-business deductions for expenses paid for the purposes recounted in said subsection (a); and making said allowance retroactive as provided in said subsections (d) and (e).

12. The trial Court erred in not holding and deciding—in harmony with the decision of this Court in the case of *Botany Worsted Mills* v. *United States*, 278 U. S. 282; and also in harmony with several Circuit Courts of Appeals —that, in a situation such as that of the instant case, the consent of the Secretary of the Treasury, or one of his designated assistants, is essential to the validity of a stipulation concerning tax liability, where such stipulation is "in the nature of a compromise".

13. The Court of Claims erred in not deciding and holding that the plaintiff was entitled to recover the full amounts of overpaid income taxes, sued for herein, for the years 1938 and 1939, together with interest thereon from the dates of their overpayment.

(It should be noted here that the petitioner sees a great many more errors of fact and of law in the Court of Claims' findings and decision, which we specified in our motion to that Court for a new trial and for amendment of findings;

and which we have faith in that Court's willingness to correct upon a then proper motion from us, if and after this Court shall have clarified and established the law on the question of either enforcing or by-passing the plain statutory requirement for approval of compromise agreements by the Secretary of the Treasury, and the right and wrong ways to apply the doctrine of equitable estoppel; but we have deemed it fitting here to raise only the primary or main issues on which the Court of Claims' opinion was based, and the facts necessary to those issues, rather than to seek to make this Court a reviewer of the facts in general.)

V

Reasons Relied On for Allowance of the Writ

The questions we seek to raise in this case are of general importance, that is to say, "there are special and important reasons" for this Court to review them. The decision of the Court of Claims herein, if it is permitted to stand, would inject a new principle into the law—one which we might call the doctrine of "easy estoppel".

The decision of the Court of Claims, in this case, is effectively in conflict with applicable decisions of this Court, that is to say, it has not given proper effect to them, some of such decisions being:

Botany Worsted Mills v. *United States,* 278 U. S. 282 and *R. H. Stearns Company* v. *United States,* 291 U. S. 54.

Among other provisions as to when this Court may accept a case for review, is that in Rule 38-5 (b), to the effect that this Court may so accept a case where the lower Court "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision." It is believed that the "accepted and usual course of judicial proceedings" con-

notes and requires correct reasoning, at least in a case of clear and undisputed facts. The first requirement of any proper exercise of judgment must be that it should be accurately reasoned, especially where the facts are simple and unequivocal.

Some of the phrases used, in defining the term "judicial" at 50 C. J. S. 559, as relating to the judiciary, indicate that, in its more technical sense, the word "judicial" imports an act, duty, function, or power "pertaining to • • • the administration of justice"; "proper to a court of law"; "practiced in the distribution of justice"; "proceeding from a court of justice"; or "relating to the dispensation of justice". Some of the same expressions, and perhaps others similar, are found also at 34 C. J. 1177.

The essence of the supposed estoppel (as recounted at what we have called the key paragraph of the Court of Claims' opinion, commencing middle of page 17 of the pamphlet copy (R. 26)) is the inequity of allowing a taxpayer to renounce his "agreement" at a time when "the Commissioner cannot be placed in the same position he was when the agreement was executed." The inaccuracy or flaw in the Court's reasoning, at this place, is that *it literally was not true that the Commissioner was out of his "same position"* (meaning still able to assess and collect further deficiencies if he so desired) *in respect to 1939*, the second of the two tax years here in issue, at the time the claims for refund were filed, November 19, 1942. Under the normal process of collection, i.e., the tax first being assessed, the statute of limitation in this respect, as to 1939, did not run until March 15, 1943. Internal Revenue Code, Sec. 275 (a). This left the Commissioner approximately four months, after the filing of the claims, in which to have assessed additional taxes for 1939, if he had so desired. *Hence, by the Court's own standard, the equitable estoppel*

against this taxpayer must totally fail as to the second of the tax years involved in this case.

Other far departures from the "accepted and usual course of judicial proceedings" by the Court of Claims in this case are where it, in aid of action first taken by the Bureau of Internal Revenue, has:

(1) Perverted one statute, Internal Revenue Code, Sec. 272 (d) providing for a waiver in the form of a "signed notice in writing", a unilateral instrument;

(2) Violated one of two other statutes, Internal Revenue Code, Section 3760 as to Closing Agreements; or Section 3761 as to Compromises (by attempting to fudge through an instrument accomplishing one or the other of these purposes without its having the approval of the Secretary or Assistant Secretary or Undersecretary of the Treasury, as each of such sections requires);

(3) Refused, without explanation, to give effect to a later relief statute, Revenue Act of 1942, Sec. 121, granting non-business deductions and making such allowances retroactive.

This decision, rendered by the Court of Claims, is in conflict with the decisions of several Circuit Courts of Appeals on the same subject matter, that is, (a) What weight should be given, in respect to so-called agreements or stipulations "in the nature of a compromise", to the statutory requirement of Internal Revenue Code Section 3761, to the effect that the Commissioner of Internal Revenue, "with the approval of the Secretary or of the Undersecretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise", etc.; or (b) What weight should be given, in respect to "closing agreements", to the similar requirement of Internal Revenue Code, Section 3760, to the effect that an agreement in writing between the Commissioner of

Internal Revenue and the taxpayer, relating to his tax liability, if approved by one of the same officers above mentioned, "shall be final and conclusive"? The Circuit Court cases referred to are the *Joyce* case and the other four cases mentioned therein following the quotation hereinabove given, at *Joyce* v. *Gentsch* (C. C. A. 6th Circ., 1944) 151 F. (2d) 891, 895.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Claims, commanding that court to certify and to send to this Court, for its review and determination, a transcript of the record and of the proceedings in the case entitled and numbered on its docket: M. Robert Guggenheim, Plaintiff, v. United States of America, Defendant, No. 46,775; and that the judgment of said court may be reversed by this Honorable Court with proper directions to cure the errors below; and that your petitioner may have such other and further relief as to this Court may seem just and proper.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 405

M. ROBERT GUGGENHEIM,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

SUPPORTING BRIEF

(To Petition for Writ of Certiorari)

I

Opinion of Court Below

The opinion of the United States Court of Claims (R. 22) had not been officially reported.

II

Jurisdiction

Judgment of the Court of Claims was entered April 5, 1948 (R. 27). Plaintiff's Motion for New Trial and for Amendment of Findings was overruled on June 28, 1948 (R. 28). Jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 939, as amended,

and as finally amended by Title 28 U. S. Code (effective September 1, 1948), section 1255(1). The claimant's Petition for Writ of Certiorari is being filed herewith. Time for filing petition for writ of certiorari was, by the September 22, 1948, order of Associate Justice Wiley Rutledge, extended to and including November 9, 1948 (R. 40) Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940; Title 28 U. S. Code Sec. 2101(c) as amended effective September 1, 1948.

III

Statement of the Case

The Statement of Matter Involved in the case, together with the Errors Assigned, in the Petition for Writ of Certiorari, *supra*, it is believed, fully recite all that is material to the consideration of the questions presented. Hence, a restatement of those points, is omitted from this part of the Brief, in order to avoid repetition.

IV

Specification of Errors to Be Urged

Petitioner is relying upon all of the errors assigned in his Petition for Certiorari but intends especially to urge those following:

1. The Court of Claims (a) erred in finding that the two paragraphs, added to the waiver (which the evidence, upon careful observation, shows were added to the waiver form by the Government alone, by being printed thereon either by mimeograph or by the multi-lithographing process, in or about the month of "June 1940"), "were not a part of the printed form"—apparently meaning at the time the Technical Staff conference was held, on or about May 1, 1941; (b) also erred in finding that these two paragraphs "were

typed on the form by the parties"; and (c) further erred in finding that this alleged typing was done "after an agreement was reached on the issues in controversy"—apparently meaning an agreement in the nature of a "compromise".

2. The Court of Claims erred in making any and all of its findings tending to indicate—and in reaching any conclusions to the effect—(a) that this petitioner in any wise took the initiative; or (b) that he even took any part, in any plan or action (1) toward "compromising" this tax matter, or (2) toward entering a "closing agreement" with the Government in respect to it.

3. The Court of Claims erred in failing to make findings of fact on material issues to the effect: (a) That the plaintiff did not, at any time, make anything in the way of a compromise offer respecting these proposed additional taxes for 1938 and 1939; (b) That he did not, either at the conference in the office of the Internal Revenue Agent in Charge or before the Technical Staff of the Bureau, make any offer or proposal in the nature of a compromise offer as to these taxes; (c) That there was not in either of these conferences any element of trade or of offering to concede on some items if the other party would concede on others; (d) That—referring to the Technical Staff's letter of May 5, 1941, defendant's Exhibit 3, to plaintiff's attorney, and to the expression it contained: "Your proposal for settlement of the above-entitled matter has been accepted"—there was no such "proposal for settlement" made by the plaintiff in this case; and (e) That there wasn't anything in the nature of trading, or conceding, or relinquishing the several items between the representatives of the Bureau and the taxpayer; it wasn't a case of "We'll do this and you do that".

4. The Court of Claims erred, likewise, in failing to find as facts (a) That, upon the taxpayer's attorney concluding

that the hurricane damage item was not worth litigating and telling the conferees that that would wind up the case, they asked him if he would recommend to his client that he sign a waiver; and he said that he would because they were interested in stopping the running of interest; and the Technical Staff then prepared the waiver, sent it to the taxpayer's tax counsel, and the taxpayer signed it and returned it; and (b) That, so far as the taxpayer's counsel knew, the filled-out waiver was not available at the Technical Staff conference; but that the conferees said they would send it to the taxpayer, that they would prepare the necessary papers and send them to the taxpayer for his signature.

5. The Court of Claims (a) erred in failing to find that the petitioner *did not take the initiative* (1) toward giving or providing the waiver of May 6, 1941, or (2) toward obtaining any "closing agreement" on the taxes here in issue with the Government, or (3) toward "compromising" such taxes, or in any plan or action looking toward such a "compromise"; and (b) also erred in failing to find and conclude that the petitioner *did not take any part* in any plan for any of such acts or procedures (except merely the signing and returning of the Waiver, the giving of which the Government suggested and which it alone, prepared and sent to him).

6. The Court of Claims (a) erred in concluding and holding that the petitioner was precluded, by the alleged "finality" of the purported "agreement" contained in the waiver, from maintaining suit on his claims for refund in issue here; and (b) further erred in concluding that this situation presents a proper case for application of the doctrine of equitable estoppel against petitioner.

7. The Court of Claims erred in not giving consideration and full effect, in its findings and decision in this case,

to Section 121 (a) (2), (d), and (e) of the 1942 Revenue Act as a remedial, curative, or relief statute, allowing taxpayers non-trade and non-business deductions for expenses paid for the purposes recounted in said subsection (a); and making said allowance retroactive as provided in said subsections (d) and (e).

8. The Court of Claims erred in not holding and deciding —in harmony with the decision of this Court in the case of *Botany Worsted Mills* v. *United States*, 278 U. S. 282; and also in harmony with several Circuit Courts of Appeals— that the consent of the Secretary of the Treasury, or one of his designated assistants, is essential to the validity of a stipulation concerning tax liability, where such stipulation is "in the nature of a compromise".

9. The Court of Claims erred in not deciding and holding that the plaintiff was entitled to recover the full amounts of overpaid income taxes, sued for herein, for the years 1938 and 1939, together with interest thereon from the dates of their overpayment.

V

ARGUMENT

Summary of Argument

1. No ground exists for equitable estoppel herein—

(a) Court of Claims' own standard as to applying equitable estoppel totally fails to show any such estoppel when viewed against the facts respecting 1939, the second of our two tax years.

(b) By the somewhat different standard, as to when a possible equitable estoppel might apply, which the Circuit Court of Appeals, 6th Circuit, used in the decision of *Joyce* v. *Gentsch*, 141 F. (2d) 891, there could be no equitable estoppel for either of our tax years.

(c) This petitioner did nothing and took no initiative, in any respect, which would justify applying the doctrine of equitable estoppel to him in this case (regardless of what standard is used for determining whether the Commissioner of Internal Revenue was in the "same position" at one time as he had been at some previous time) as is obvious by even a reasonably careful analysis of the elements and principles of that doctrine.

2. The Court of Claims' decision does not give proper effect to certain decisions of this Court; and, in fact, is directly in conflict with one of them, to wit, *Botany Worsted Mills* v. *United States*, 278 U. S. 282. The other decision of this Court, to which the Court of Claims did not give proper effect, was *R. H. Stearns Co.* v. *United States*, 291 U. S. 54.

3. By its decision, the Court of Claims has aided and abetted the Bureau of Internal Revenue; and also, on its own responsibility, has:

(a) perverted that part of our statutory law which prescribes the type of Waiver here in issue as a "signed notice in writing," a unilateral instrument, which therefore, if properly designed according to the intent of the statute, is not an "agreement" of any kind (Int. Rev. Code, Sec. 272 (d));

(b) violated one or both of two other portions of our statutory law, Sec. 3760 of the Internal Revenue Code as to "closing agreements"; or Sec. 3761 as to "compromises" by trying to fudge through the so-called "agreement," either as a "final and conclusive" "closing agreement" or as a "compromise," without its having the approval of the Secretary or Assistant Secretary or Undersecretary of the Treasury, as these sections of the law both required of each such type of instruments; and

(c) refused to give effect to the remedial statute allowing deduction, from taxable income, of non-business expenses and making such allowance definitely retroactive. Sec. 121 of Revenue Act of 1942.

4. The Court of Claims' decision herein is in conflict with the decisions of several Circuit Courts of Appeals on the same subject matter—i.e., what weight should be given the requirements for approval, by the Secretary, Assistant Secretary, or Undersecretary of the Treasury, of "closing agreements" per Internal Revenue Code, Sec. 3760; and of "compromises" per Sec. 3761—such decisions being:

Joyce v. *Gentsch*, 141 F. (2d) 891;

Brast v. *Winding Gulf Colliery*. (C. C. A. 4) 94 F. (2d) 179;

Hughson v. *United States* (C. C. A. 9) 59 F. (2d) 17;

Anderson, Collector of Internal Revenue v. *P. W. Madsen Inv. Co.* (C. C. A. 10) 72 F. (2d) 768;

Schneider v. *United States* (C. C. A. 6), 119 F (2d) 215.

5. One of the "special and important reasons" why the Court of Claims' decision rendered herein should not be permitted to stand is that it would inject into our tax law a brand-new principle which could be called the "doctrine of easy estoppel." Whether this innovation shall be permitted to occur, through the back-handed instrumentality of an unfortunately erroneous opinion of a trial court, renders this case one of general importance.

6. Showing that the petitioner was acting within the spirit of the statutes; whereas the Government was not doing so, is the circumstance that the Government, itself, was guilty of "misrepresentation of a material fact" or facts which, under the specific terms of the Internal Revenue Code, Sec. 3760 (b), would have justified *the taxpayer* in reopening the case and, by a suit such as this one, in having

the determination, assessment, and collection of the tax annulled, modified, and set aside—*even if* the purported compromise or settlement agreement had had the approval of the Secretary of the Treasury or his designated representative; said misrepresentation by the Government having been that the taxpayer had made a proposal for settlement of the case and that there had been a "compromise" or "closing agreement" negotiated at the conferences; whereas neither of these misrepresentations was true in any sense whatsoever.

Argument

A supposed equitable estoppel of this petitioner-taxpayer, against his suing to recover overpaid income taxes after disallowance of his refund claims therefor, is the principal basis for the decision of the Court of Claims in respect to which the petitioner now seeks certiorari. The supposed estoppel is based on the incorrect assumption that the taxpayer had sought to renounce a so-called "agreement," in the nature of a compromise of his taxes, at a time when "the Commissioner cannot be placed in the same position he was when the agreement was executed."

That assumption in respect to the second of the two tax years here involved, 1939, is literally untrue and obviously incorrect because the statute of limitations against the Commissioner's assessing of additional taxes for that year, if he had desired to do so, lacked approximately four months of having run at the time the taxpayer filed his refund claims for the two years 1938 and 1939. Thus, by the Court of Claims' own standard for determining whether the Commissioner was "in the same position," the purported estoppel herein must totally fail as to the tax year 1939.

However, the Sixth Circuit Court of Appeals, in the case of *Joyce* v. *Gentsch*, 141 F. (2d) 891, uses a different standard or period for determining a possible estoppel in this

type of situation. That Court uses the period between the executing of the waiver and the expiration of the statutory time for assessing, and thus finds, in that case, that the Commissioner had more than five months in which he "could have asserted a further deficiency." Applying that standard to the instant case, we should note first that the so-called "agreement" was in and a part of the waiver. By such a standard, the Commissioner, in the instant case, would have had more than ten months in which to assert a further deficiency as to 1938, the earlier of the two years here involved; and more than one year and ten months as to 1939, the later tax year herein.

An analysis of this case, either cursory or in detail, demonstrates that the petitioner did not take the initiative, that is he did no "acts," in suggesting or obtaining or giving the waiver here involved, which contains the so-called "agreement" which is supposed to have effected the estoppel. The waiver was suggested by the Commissioner's representatives, was entirely prepared and worded by them, and was sent to the taxpayer, through his attorney, for his signature. All he did was to sign it and return it, as requested by the Government. The substance of the law as to this type of estoppel is stated in Corpus Juris thus:

> "Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe

> certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts" 21 C. J. 1113, 1114, Sec. 116.
>
> To the same effect, see 31 C. J. S. 236, 237, Sec. 59.

Clearly, this case does not in any respect present a situation where the person alleged to have estopped himself has remained silent when he ought to have spoken out. It never has been suggested that such an element was in the case. Hence, the only question is whether the taxpayer took the initiative, whether he did some act by which he should be precluded from later showing the true facts. It is noted also that there must have been an intentional misleading of the other party, or "culpable negligence." These latter ideas are so remote from any possible fair construction of the facts of the case, or from anything that has been suggested in respect to them, that there is no need, at this point, of repeating the circumstances to show that no such situation existed.

A good resume of the facts which must be found to exist in a case in order to support an estoppel is found under the subject of the instructions which a trial court must give to a jury trying such a case in order to support a finding that estoppel existed. We find such a statement of the requisite facts in Corpus Juris. The text says that, where there is an issue of estoppel, the court should instruct the jury as to the essential elements of the kind of estoppel relied on; and then continues:

> "If an estoppel in pais is pleaded, the court must instruct the jury that the representations or silence relied on to create the estoppel were intended to deceive, or were so culpably negligent as to amount to fraud; that the party against whom the estoppel is claimed had knowledge of the truth of the material facts represented

or concealed; and that the party claiming the estoppel was in ignorance of such facts or without means of ascertaining their existence, that he relied on such representations or silence, and was warranted in so doing, that he changed his position in reliance thereon and that he will sustain injury unless the estoppel is sustained." 21 *C. J.* 1253, 1254, Sec. 271.

To the same effect, see 31 *C. J. S.* 464, 465, Sec. 164.

Corpus Juris Secundum defines equitable estoppel and recites the elements which constitute it, after which the text continues:

"* * * and the same definition is given estoppel in pais and estoppel by misrepresentation, these terms, as shown infra in subdivision c of this section, being used interchangeably with the term 'equitable estoppel.'" 31 *C. J. S.* 236, 237, Sec. 59.

The decision of the Court of Claims is in conflict with the decision of this Court in the case of *Botany Worsted Mills* v. *United States,* 278 U. S. 282; and has failed or declined to give effect to it, especially where this Court—in speaking of R. S. Sec. 3229, the predecessor section to the present Internal Revenue Code Sec. 3761, as to compromising cases of taxes "arising under the Internal Revenue laws"—said:

"We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, * * *. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. * * *

"It is plain that no compromise is authorized by this statute which is not assented to by the Secretary of the Treasury. * * *." *Botany Worsted Mills* v. *United States,* 278 U. S. 282, 288, 289.

Another decision of this Court, to which the Court of Claims has not given proper effect, is that of *R. H. Stearns Co.* v. *United States,* 291 U. S. 54. In that case, this Court very properly held the taxpayer to have estopped himself, by his acts, from later claiming refund of certain taxes, that is to say, he had taken the initiative in doing the thing which constituted the estoppel. As the opinion of this Court said:

> "* * * *there was a positive request,* which till revoked upon reasonable notice had the effect of an estoppel." *R. H. Stearns Co. v. United States,* 291 U. S. 54, 59. (Italics supplied.)

In that case, the taxpayer, after having made such "positive request", later sought to win its case by taking the opposite position, viz., by saying that the set off, *which it had requested the Commissioner to make,* was definitely illegal.

Here should be made a correction in the Court of Claims' opinion in the instant case where it says we, the plaintiff there, contend "that under no circumstances will a closing agreement be held binding unless executed in accordance with Section 3760 of the Internal Revenue Code". (R. 26) As a matter of fact, we had not made that contention; but the *Stearns* case is so different from the instant situation as to be no authority to the contrary, even if we had.

However, after analyzing the *Stearns* case and all others which have come to our attention, we may as well say now—even though we might not previously have "contended" for quite so strong a position—that, under no circumstances which we can visualize, will a waiver "agreement", anything like the one here in issue and obtained under similar circumstances, properly be held binding unless executed in accordance with Section 3760 of the Internal Revenue Code, at least to the extent of having the approval of the Secre-

tary of the Treasury or the Under Secretary or an Assistant Secretary.

We have suggested that the Court of Claims, by going along with the Bureau of Internal Revenue so strongly in the "agreement" idea as to this waiver which is supposed to be only a "signed notice in writing", a unilateral instrument, has perverted the statutory provision for such a waiver, i. e., Internal Revenue Code, Sec. 272 (d). A mere reading of the section makes this point apparent. A similar violation of the statute is obvious in the way the trial Court has permitted the Bureau to effectuate, through this waiver, an "agreement" in the nature of a compromise of taxes, without complying with the statutory requirements as to "closing agreements", Sec. 3760 of the Code; and as to "compromises", Sec. 3761 of the Internal Revenue Code.

The Court of Claims, in this case, has not given proper effect, nor in fact any effect at all, to the remedial statute which we have invoked, Sec. 121 of the Revenue Act of 1942, which definitely was made retroactive so as to include the tax years here involved—and the passage of which Act was the moving cause of the taxpayer filing the claims for refund which are the basis, procedurally speaking, of this lawsuit. That the liberal construction required for relief statutes extends also to the matter of resolving all reasonable doubts in favor of their applicability to a particular case is shown at 12 C. J. 1302, Sec. 4.

Four cases from various Circuit Courts of Appeals are shown above as cited in *Joyce* v. *Gentsch*, 141 F. (2d) 891, 895, to the effect that consent of the Secretary of the Treasury has been considered essential to the validity of a stipulation concerning tax liability "where such stipulation is in the nature of a compromise". No point would be served in quoting from those cases here. Some of them rule in

favor of the Government on the respective tax issues which they involve, or on other points not pertinent to the instant case, but they all fairly support the statement for which the Sixth Circuit Court cites them in the *Joyce* v. *Gentsch* case.

A proper application of the basic doctrine of estoppel—so very equitable when aptly applied—is so important to the whole structure of our law that a situation, such as that here presented, should not be permitted to generate a new rule or exception which might be referred to as the "doctrine of easy estoppel".

Upon rereading Sec. 3760 (b) of the Internal Revenue Code, in connection with the facts of this case, we were so remarkably impressed with the fact that "the Government", not meaning any particular known person nor anybody with malicious intent of course, had been guilty of a "misrepresentation of a material fact" or facts, that we could not restrain the impulse to bring it to this Court's attention. Such misrepresentation by the Government was its agents' insistence that this taxpayer had made a proposal for settlement of the case and that there had been a "compromise" or "closing agreement" negotiated at the conferences held in the Bureau of Internal Revenue, whereas there was no fair basis whatsoever for such misrepresentations.

Conclusion

It is respectfully submitted, therefore, that this case is one calling for the exercise by this Court of its supervisory powers, in order that the decision of the United States Court of Claims may be reviewed and the errors committed by that Court corrected, and its judgment finally reversed with directions that petitioner was entitled to recover as overpaid income taxes such overpayments as actually were made, which amount was set forth in plaintiff's petition in

that Court as $10,093.11, together with interest thereon from the dates of overpayment, and that to such an end a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 405.

M. ROBERT GUGGENHEIM, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the Court of Claims.

PETITIONER'S REPLY BRIEF

To Government's Brief in Opposition to His Petition for Certiorari.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CASES CITED.

OTHER AUTHORITIES.

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The Government's Brief in Opposition does not, in a direct or logical manner, answer any of the points which petitioner has made in his Petition for Writ of Certiorari and Supporting Brief. Therefore, we believe the Government, lacking a forthright answer, has sought to avoid the real issues involved in this certiorari question.

At the beginning of its argument, pp. 9, 10 of its Brief, the Government reiterates a number of prejudicial statements and ideas which we already have disproved, or which

obviously are unsound, and thereby leads into the thought that "The Government agrees" with the Court of Claims' statement which we have called the "key paragraph" of that Court's opinion and which we have demonstrated, even on the Court of Claims' own basis, to be completely and unquestionably inaccurate *as to one of the tax years involved in this case;* and to be definitely inconsistent, *as to both of our tax years,* with a Circuit Court decision, that is to say, in respect to the basis, of applying the principle of equitable estoppel, which the Sixth Circuit Court of Appeals used in its *Joyce* v. *Gentsch* (141 F. 2d 891) decision. Petition for Writ of Certiorari p. 15; Supporting Brief pp. 26, 27.

It is remarkable that the Government should cite the *Stearns* case (291 U. S. 54, 61, 62) pp. 10, 11 of its Brief in Opposition, as being one wherein this Court allegedly "rejected a contention similar to that made here"; whereas the exact opposite is true, by any fair comparison as to similarity. The *Stearns* case is just as *dis*similar as it could be—and involve roughly comparable subject-matter—in the element of chief importance to its possible application to this case. The quotation from that opinion which the Government sets forth makes this apparent, when read against the factual background of the instant case. As a matter of fact, we quoted a part of the same text, in reciting errors of law which we were alleging in our Motion for New Trial in the Court of Claims, as showing the "fundamental and unquestioned" principle that "He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned".

The whole point here is that this petitioner *did not* "prevent" the Commissioner from making any possible further assessments which the Government might have wished to make, since he took no initiative whatever toward preparing or giving the so-called "agreement" in the waiver, or the waiver itself. And, for the same reason, the petitioner did not and could not possibly have "occasioned" any "nonperformance" on the Commissioner's part respecting

any possible further tax assessments. A cursory review of the *Stearns* opinion reveals at least nine (9) separate references to the taxpayer therein having taken the initiative toward inducing the Commissioner to take a step or forego an action of which that taxpayer later tried to take advantage. They are:

1. Reference is made therein to a claim for refund filed on a certain date wherein "the petitioner * * * asked that the unpaid balance for 1917 be set off against the claim for overpayment and that the remainder be refunded." p. 57.

2. The opinion mentions the fact that, in auditing the tax for 1918 and crediting the overassessment for that year upon the tax for the year before, the Commissioner acted "at the request of the petitioner, which was valid till revoked." p. 59.

3. Court concluded that it did not need to rule on whether the waiver, on which the taxpayer therein was depending, had been properly approved, because in that case there was "more than a waiver" (which was merely "an abandonment of a privilege to insist upon the fulfillment of a condition") since "there was a positive request, which till revoked upon reasonable notice had the effect of an estoppel." p. 59.

4. The Court noted that certain waivers were on file but that the petitioner did not rest upon them; and that "without more" they would not have "availed to avert the threatened levy." The opinion then states that on a certain date "the petitioner filed with the Commissioner a request to withhold the process of collection until credits were adjusted." pp. 59, 60.

5. The opinion mentions a certain date upon which a collector's report, of a stated amount being still unpaid upon the tax for 1917, was received by the Commissioner; and then continues to the effect that "Promptly thereafter (June 28, 1924), he had complied with the petitioner's instructions by offsetting the overpayment for the one year in reduction of the balance owing for the other." p. 60.

6. Having referred to the matter of offsetting one year's credit for tax overpaid against another year's additional tax due, the opinion continues: "The whole process had been completed within the time fixed by implication in the petitioner's request, within the time when assessment was due for the last of the group of years (1918 to 1921) to be covered by the audit." p. 60.

7. The difference between a merely tacit or inactive "approval" and an "inducement or request" is clearly suggested where the opinion refers to a statute, rendering "void" any credit made by the Commissioner "against a liability barred by limitation", and then continues by explaining that the aim of that provision was to invalidate such a credit if made by the Commissioner of his own motion without the taxpayer's approval "or with approval falling short of inducement or request." p. 60.

8. The opinion states that, "If nothing more than this appeared (i. e., more than "approval falling short of inducement or request"), then "there was to be no exercise in invitum of governmental power"; and proceeded to explain that, in determining whether liability had been barred by limitation, "it will not do to refer to the flight of time alone"; but that "The limitation may have been postponed by force of a simple waiver, which must then be made in adherence to the statutory forms, or so we now assume." The explanation continued: "It may have been postponed by deliberate persuasion to withhold official action." p. 61.

9. That, in order to be synonymous with estoppel, the action, which the taxpayer later contends was invalid, must have been taken "at the taxpayer's request", is indicated where the Court expresses the thought of it being "an unreasonable construction that would view the prohibition of the statute as overriding the doctrine of estoppel * * * and invalidating a credit made at the taxpayer's request." The opinion continues with several reiterations of the idea of the taxpayer's request for the action which the Commissioner took, proceeding thus:

"Here at the time of the request, the liability was still alive, unaffected as yet by any statutory bar. The re-

quest in its fair meaning reached forward into the future and prayed for the postponement of collection till the audits for later years had been completed in the usual course. This having been done, the suspended collection might be effected by credit or by distraint or by other methods prescribed by law. Congress surely did not mean that a credit was to be void if made by the Government in response to such a prayer." p. 61.

There followed immediately the part of the *Stearns* opinion quoted in the Government's Brief in Opposition. It now should be amply clear that the Court was basing its decision, holding estoppel in the *Stearns* case, largely on *the fact that the taxpayer therein had taken the initiative* in persuading the Commissioner to do or to refrain from doing acts, pertaining to his tax, as to which he later sought to take advantage on the basis that the Commissioner was wrong in having followed his, the taxpayer's, "prayer". There are other important differences between the *Stearns* case and the instant situation; but they do not seem to be of sufficiently direct pertinence to the point above reviewed to justify recounting them here.

The Government's Brief in Opposition, p. 11, cites three other cases as being in "Accord", supposedly meaning that they are in accord with the quotation which has just been given from the *Stearns* case. Perhaps they are in "accord" with what this Court *really said* in the *Stearns* case, and what it *really meant*, which of course are the same thing. But they are not in accord with the obvious purpose for which the Government cited and quoted from the *Stearns* case, that is to say, its rather ill-advised attempt to present that decision as an authority justifying application of the principle of estoppel against the taxpayer, as the Government is seeking to do in the instant case. A brief analysis of those three "Accord" cases seems called for here:

Dickerson v. *Colgrove*, 100 U. S. 578:

This opinion makes a general statement of the principle of "equitable estoppel or estoppel *in pais*", similar in sub-

stance to that quoted from the *Stearns* case in the Government's Opposition Brief herein, pp. 10, 11. The general statement we refer to is the same statement quoted from the *Dickerson* case in the *Ralston* decision, which we shall mention immediately following.

The most pertinent facts of the *Dickerson* case were these. Chauncey, in California, upon receipt of a letter of inquiry from Morton in Michigan, as to whether he made any claim to the premises known as the Conger farm (in which his sister had had an interest which Morton had bought), replied by a letter "wherein he disavowed, in strong terms, the intention ever to assert such a claim". p. 579. The time of adverse possession, by Morton and other defendants who had lived on the land and improved it, "lacked but a year and a month of being twenty years,—when, it is conceded the statutory bar would have been complete". p. 581.

The Court held that plaintiff, Dickerson, to whom Chauncey had conveyed by quitclaim deed, was not a bona fide purchaser; and also that he was prevented from maintaining his claim "by an estoppel *in pais*". It is clear that Chauncey, the person against whom the estoppel applied, had actively misled the person who would have been injured if the Courts had not been willing to interpose the very equitable and very necessary principle of estoppel *in pais* which, as we have shown by a citation at p. 29 of our Brief in Support of Petition for Certiorari, has "the same definition" as estoppel by misrepresentation.

Ralston Purina Co. v. *United States*, 75 Ct. Cl. 525, 58 F. 2d 1065:

This is another case in which the taxpayer would have actively misled the Commissioner to his hurt if the principle of estoppel had not been applied. In order to be relieved of the burden of having to pay a substantial additional tax for 1918, the

> "plaintiff communicated with the commissioner by telegram in which it asked that collection of the additional tax due for 1918 be withheld until the overpayment for 1919 was adjusted."

After again referring to this request by the taxpayer for an offset, the opinion continues:

> "In consideration thereof the commissioner advised the collector to take no steps to collect the deficiency until receipt of the schedule of overassessment for 1919. But for the plaintiff's telegram to the commissioner the additional tax for the fiscal year 1918 would have been collected or a distraint proceeding for the collection thereof would have been begun prior to the expiration of the limitation period of five years after the return for 1918 was filed * * *."

Botany Worsted Mills v. *United States*, 278 U. S. 282:

Both the Government and the Court of Claims seem to be grasping at a straw in trying to find authority in the *Botany Mills* case for supporting an estoppel of the taxpayer in the instant case. After citing it in support of estoppel here (Brief in Opposition p. 11), the Government remarks that it is a case in which "no ground for estoppel appeared in the record or was claimed". Wherefore, with no issue on estoppel, whatever the opinion said about that subject necessarily must have been no stronger than dictum. And then, when we recall that all the Court did was to utter an "aside" or safety remark to the effect that there might be facts in a case which would justify applying the principle of estoppel, the conclusion seems unavoidable that the *Botany Mills* case is not very strong authority for applying estoppel to any particular later case.

This use of the case by the Government in its present Brief is only slightly weaker, toward justifying estoppel in the instant case, than the Court of Claims effort to establish, by the *Botany Mills* case, the proposition (as between case A and case B) that *the degree of informality*—in the compromise, or the alleged compromise, "agreement" and

in the process of obtaining it—is what should determine its acceptability, even in the face of the lack, in both instances, of the statutory requirements. The intimation was made that the compromise in the *Botany Mills* case was quite informal (this, inferentially, being the reason why such compromise was not accepted) and that the "compromise" in the instant case was very formal (which provided the reason why it should be accepted).

The foregoing, we believe, is a definitely erroneous view of the logical basis of the Court's decision in the *Botany Mills* case. We should be pleased at the proper time to show in detail wherein this is true; but this Brief obviously is not the place to undertake any such lengthy explanation. It should suffice here to say that we see no indication that this Court meant to recognize any varying degrees of informality. There were but two situations: *first*, the formal one, i. e., having the approval of the Secretary of the Treasury, just as the law required; and *second*, the informal one, which did not have the signature of this official and therefore did not conform to the statute and therefore was ineffective. It would be an odd situation in the law if a good imitation, of a simple requirement such as the approval of a stated official (but which, nevertheless, definitely failed to meet the requirement) were permitted to get by; whereas a poor imitation (but which was no different in its lack of the thing required) was ruled inacceptable. That would be to reward the clever and to penalize the non-clever.

The Government, it seems, would like to belittle the effectiveness of the case of *Joyce* v. *Gentsch* (C. C. A., 6th Circ., 1944) 141 F. 2d 891, which we have referred to, especially at Petition for Certiorari, p. 7; and in our Brief in Support, at pp. 26, 27. If the Court agrees that that case "is typical of the cases on which petitioner relies to assert a conflict" (Brief in Opposition, p. 11), then the certiorari problem is solved at once in favor of the petitioner. The only trouble then lies in the fact that it is a rather long

opinion and requires a bit of careful reading in order to be sure of getting its full and correct significance.

The part which the Government quotes from the *Joyce* opinion has a somewhat different appearance when read in its context. It then becomes evident that such portion is giving a secondary or subordinate reason why the parties were not bound by the "waiver agreement", the first and principal reason being "a lack of authority from the Secretary of the Treasury for its execution". This element is the same as in the instant case. The way the Court's opinion leads into the portion quoted in the Government's Opposition Brief is this:

> "In the instant case, the Government was not bound by the waiver agreement; not only because of a lack of authority from the Secretary of the Treasury for its execution, but also because by its very terms * * *"
> [Etc., proceeding as quoted in the Government's Brief, p. 11]

The subordinate reason, which the Government now is seeking to emphasize for the parties not being bound by the "waiver agreement", does not injure this petitioner's case when the facts are analyzed. The first answer is that, if an "agreement" is ineffective because it fails to conform to a specific statutory requirement, it has no need of any further reason for being void, in order to be so held by the Courts, such as lack of "mutuality". Wherefore, it does not avail the Government any benefit even if the instant case were totally different from the *Joyce* case in the respect noted in the secondary reason given by the quotation in its Brief. The next answer to the Government's reference is that the really effective part of the footnote was *left in* the form used in the instant case; and the phrase stricken out was only an explanatory appendage, the basic meaning being just the same by reason of the categorical statement which remained.

The basic part of the sentence, *which was not stricken out,* was where, after a previous sentence in the foot-note had referred to "this waiver", the statement continued with the sentence in question thus: "It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code * * *". Here follows the interpretative phrase which was stricken out, thus: "* * * *and does not, therefore,* preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due * * *". (Emphasis supplied) Since, as the *remaining* sentence says, the waiver is not "a final closing agreement under section 3760 of the Internal Revenue Code", "The right to assess a further deficiency" still remained, even though it might not have been quite so "expressly" reserved. The same thought was once expressed; but, instead of the language doubling back and saying it again in the form of a "therefore" phrase "spelling out" the detailed meaning of what already had been said, the sentence as revised merely contained the categorical statement of the basic element.

Earlier in the *Joyce* opinion, the Court had noted that the waiver, Form 870, "was not binding upon the Government and, therefore, did not bind the taxpayer"; and then the statement immediately continued:

> "The waiver agreement was not signed, approved, or accepted by any one authorized by the Acts of Congress to bind the Government *to a tax compromise,* or *to a closing agreement.* The statutes are specific. * * *" (Emphasis supplied) (I. R. C. Secs. 3760 and 3761) p. 894.

Further along in the opinion is the statement, quoted at p. 7 of our Petition for Certiorari, to the effect that circuit courts of appeal, upon the principle of the *Botany Mills* case, have considered the consent of the Secretary of the Treasury as essential to the validity of a stipulation concerning tax liability "where such stipulation is in the nature of a compromise." p. 895. There is no doubt in the

instant case, under the Government's view, that the "agreement" was "in the nature of a compromise".

At another place in its opinion, the Court, in the *Joyce* case, stated it was true that the statute barred the Commissioner from making additional assessments, when the claims for refund there in controversy were filed; and then continued:

> "* * * but it is also true that the period of limitation within which the Commissioner could have asserted a further deficiency did not expire until March 15, 1938, *which was more than five months after the Waiver was signed;* and *there was no evidence produced at the trial, nor any averment made by the Commissioner, that there were any existing facts affording a basis for further deficiency assessment.*" (Emphasis supplied) p. 894.

In the instant case it likewise is true that there has been no evidence produced nor any actual averment by the Commissioner that there were any facts in existence affording a basis for further deficiency assessments. There have been innuendoes thrown around a number of times by the Bureau's representatives to the effect that there *might have been* a desire by the Commissioner, never defined to the slightest degree, to assess further taxes since the taxpayer had opened up the case. But such intimations or inferences are far from being sufficient to establish any real desire by the Commissioner to assess additional taxes and therefore possible damage to him if estoppel is not held to apply herein. Corpus Juris Secundum has this to say on the point:

> "Before an estoppel can be raised there must be certainty to every intent, and the facts alleged to constitute it are not to be taken by argument or inference. Nothing can be supplied by intendment. No one should be denied the right to set up the truth unless it is in plain contradiction to his former allegations or act. *If an act or admission is susceptible of two constructions, one of which is consistent with a right asserted*

by the party sought to be estopped, it forms no estoppel." (Emphasis supplied) 31 C. J. S. 282, 283, Sec. 77. Same statement at 21 C. J. 1139, Sec. 139, except that additional cases are cited in footnotes.

The Government cites a number of other cases apparently meaning to indicate that they are to the same effect as its incorrect suggestion as to the holding in the *Joyce* case. The case of *Baldwin* v. *Higgins* does not support the Government's position in this case. That decision, by the District Court of the Southern District of New York, is not officially reported but may be found at 19 A. F. T. R. 1341; or as Ct. Dec. 1302, Internal Revenue Cumulative Bulletin, 1938-1, p. 264. The Circuit Court's decision, 2nd Circuit, is reported at 100 F. 2d 405. Therein neither party questioned the existence of a compromise agreement. Both of the court decisions recognized, without question, that there was such an agreement. The District Court's opinion refers to the *Botany Mills* case but does not mention the principal reason why this Court there held the agreement not to be binding, that is, because of the lack of approval by a certain official as definitely required by statute. The District Court seems mistakenly to assume that the agreement in the *Botany Mills* case may have been held invalid because of its high degree of general informality.

So far as the District Court's opinion discloses, the taxpayer there, Mr. Baldwin, may never have attacked the settlement or compromise agreement on the ground of its not having been approved by the Secretary of the Treasury. Furthermore, there was no remedial statute involved, similar to Sec. 121 of the 1942 Revenue Act, practically inviting the taxpayer to file a refund claim in the particular type of situation presented by the case.

The case of *Rubel Corp.* v. *Rasquin*, 43 F. Supp. 111, was entirely different from the instant situation. While an "offer of settlement" was made by the taxpayer, it never was formally, nor otherwise directly, accepted by the Commissioner. The taxpayer had meanwhile filed appeals in

the Board of Tax Appeals, the controversies were there settled on stipulations, and the Board affirmed the Commissioner's findings. The taxpayer did not appeal from this final determination. Later it commenced actions in the District Court for the Eastern District of New York. These cases were dismissed on the defendant's motions. The Court recounted the two alternate methods of procedure which the law afforded to the plaintiff; remarked that it had "elected to take its controversy to the Board of Tax Appeals, a forum with full authority and jurisdiction, the determination of which could be reviewed * * *"; and later explained that:

> "Congress, having provided the plaintiff with the right to review the findings made by the Board of Tax Appeals, foreclosed its right to a second remedy after selecting one." *Rubel Corp.* v. *Rasquin,* 43 F. Supp. 111.

In the case of *Bank of New York* (*Ex. Nichols*) v. *United States* (C.C.A. 3rd Circ. 8-24-48), not yet officially reported but available at 1948 Prentice-Hall Federal Tax Service Par. 72,585, the Circuit Court reversed the District Court. The particular compromise settlement there under review was held not a bar to a suit for recovery of the tax which had been paid under that settlement agreement. No question was raised as to whether there really had been a compromise effected. The settlement or compromise offer was made in a letter of the taxpayer's own phrasing, letter of November 24, 1937, wherein it referred to "this settlement, which is submitted in the form of a compromise"; and later spoke of "this offer" being "either accepted or rejected".

The settlement agreement in that case was more favorably worded, so far as a later suit by the taxpayer to recover might be concerned, than the so-called "agreement" in the instant case. But, since the whole of the informal compromise is ineffective, not being "in accordance with the statute", it makes little difference what such informal papers say or do not say. For the basic decision of this

type of case, we never really need to get down to the detail of looking at the terms of the agreement or alleged "agreement", any more than is necessary to see whether they were approved by the prescribed officers.

The Circuit Court reversed the District Court on the principal basis—so far as the interests of our case are concerned—that the situation presented "was not a true account stated, because, as is frankly admitted, the agreement was not a final settlement." And the opinion continued: "To be that it had to be signed by the Commissioner or his designate and approved by the Secretary or Undersecretary of the Treasury in accordance with the statute." The Court then remarked that "Those necessary signatures were obtained after suit had been started, but by then it was too late."

At page 12 of its Brief in Opposition, the Government seems to be trying, quite feebly indeed, to get some aid and comfort out of the *Castell* case against the remedial statute (Sec. 121 of Rev. Act of 1942) which we have invoked as the reason for claiming, as non-business expense deductions, the tax determining items in the instant case. We find no authority in the *Castell* case to any such effect. It seems necessary, therefore, to take a brief view of what *is* held by *Castell* v. *United States,* 98 F. 2d 88.

The plaintiff therein contended that the Attorney General had no power to withdraw an appeal on terms which involved a cash settlement and that such settlement should have been made by the Commissioner with the approval of the Secretary of the Treasury. The Court held this contention invalid because the Attorney General *had* authority to abandon the appeal by reason of his control over litigation in which the United States is a party. R. S. Sec. 359 (T. 5 U. S. C. A. Sec. 309). Furthermore, Sec. 3761 of the Internal Revenue Code, in reference to tax case compromises, makes no restrictions or requirements (similar to those where the "compromise is made by the Commissioner") as to compromises by the Attorney General in "any such

case after reference to the Department of Justice for prosecution or defense".

There was, in the *Castell* case, a real settlement effected —which also was a compromise—by the Attorney General acting for the United States. The estoppel there allowed was not contrary to any provision of law since, under the applicable statute, the Attorney General had full right to compromise such a case without approval either of the Commissioner or of the Secretary of the Treasury.

One element toward justifying estoppel was that the instrument of April 7, 1926, settling the case previously instigated (wherein judgment had been rendered against the taxpayer and the Government had appealed), contained the taxpayer's admission that the taxes in controversy were "properly assessed and due and owing by her"; and this settlement agreement further stated that "in consideration of the premises the plaintiff hereby forever waives any right which she may now have or which may be given to her by future legislation of any kind or character whatsoever; to make any claim against the United States or any officer, agent, or agency thereof for the refund of the sum so withheld or any part or portion thereof."

It was stated in the opinion that the taxpayer "was estopped to question its [the settlement's] terms" where she had "received and retained the fruits of the settlement". In the instant case, the taxpayer did not receive any benefits, by way of concessions, at the closing of his tax matter following the conferences in the Bureau of Internal Revenue.

The case of *Ross* v. *United States,* 75 F. Supp. 725, is similar to some other cases in respect to the taxpayer's previous appeal to the Board of Tax Appeals precluding her from later having a determination of the same issues in the courts. One such case, which we already have reviewed herein, is *Rubel Corp.* v. *Rasquin,* 43 F. Supp. 111. Another is *The Bankers Reserve Life Co.* v. *United States,* 44 F. 2d 1000, which the Government's Brief in Opposition also

mentions. In the *Ross* case, the taxpayer *had taken and pursued* one of two optional but mutually exclusive routes. In the instant case, by the particular instrument here in question, the waiver, the taxpayer *declined to take* the first optional route; but later pursued the second. These different circumstances seem to present two opposite situations. How they can be aligned, in the Court of Claims' opinion in this case, as similar is more than we can understand.

No strength is added to the Government's position herein by the suggestion, p. 13 of its Brief, that a tax may not be recovered where a settlement has been made and, later, the statute under which the tax was assessed has been held invalid. The instant case just isn't of that type. The idea that a recovery of this sort might be thought to be easier, and then that even such a recovery is not permitted, adds no validity to the Government's position here.

Neither do the cases, which the Government cites to the point stated, aid its case here by reason of the issues on which such decisions otherwise turn. The case of *Bankers Reserve Life Co.* v. *United States,* 44 F. 2d 1000, as above classified along with the *Rubel Corp.* case, is one wherein the taxpayer, first having elected one of two alternate and mutually exclusive routes for his litigation, may not afterwards pursue the other route.

In *Wisconsin National Life Insurance Co.* v. *United States,* 42 F. 2d 316, the "closing agreement" was in due form under all the requirements of the statute and therefore it was sustained as valid. Wherefore, it seems rather to emphasize the particular defect which we are pointing out in the alleged "agreement" of the instant case. The Court there said:

> "* * * the plaintiff and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on September 27, 1927, executed an agreement in respect of the tax and interest for these years under and pursuant to the provisions of section 1106(b)

of the revenue act of 1926, * * *" (that section having been the predecessor of Internal Revenue Code Sec. 3760).

The case of *Hord* v. *United States*, 59 F. 2d 125, was similar except that it involved a tax compromise which had been executed in due form. The Court said it was of the opinion

> "that the offer of compromise and its acceptance by the commissioner, with the approval of the Secretary of the Treasury, finally closed the case, and that plaintiff may not maintain this action to recover the additional tax * * *".

Wherefore, petitioner continues respectfully to pray that a writ of certiorari may be issued as prayed in his Petition therefor.

Respectfully submitted,

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INDEX

CITATIONS

818205—49

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 405

M. ROBERT GUGGENHEIM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 22–27) is reported at 77 F. Supp. 186.

JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1948. (R. 27–28.) Petitioner's motion for new trial (R. 28) was filed June 4, 1948, and was denied (R. 28) on June 28, 1948. The petition for certiorari was filed November 9, 1948 under an extension order of this court dated September 22, 1948. (R. 40.) The jurisdiction of this court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether, notwithstanding an agreement between the taxpayer and his representatives and the representatives of the Commissioner of Internal Revenue, finally settling and disposing of taxpayer's disputed tax matters for the years 1938 and 1939, taxpayer can maintain this action for recovery of alleged tax overpayments for those years.

STATUTES INVOLVED

Internal Revenue Code:

> SEC. 23 [as amended by Sec. 121 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—
>
> * * * * *
>
> (2) *Non-Trade or Non-Business Expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.
>
> * * * * *
>
> (d) *Taxable Years to which Amendments Applicable.*—The amendments made by this section shall be applicable to taxable years beginning after December 31, 1938.

(e) *Retroactive Amendment to Prior Revenue Acts.*—For the purposes of the Revenue Act of 1938 or any prior revenue Act the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such revenue Act on the date of its enactment. (26 U. S. C. 23.)

SEC. 3760. CLOSING AGREEMENTS.

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) *Finality.*—If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection payment, abatement, refund, or credit made in accordance there-

with, shall not be annulled, modified, set aside, or disregarded. (26 U. S. C. 3760.)

SEC. 3761. COMPROMISES.

(a) *Authorization.*—The Commissioner with the approval of the Secretary or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense. (26 U. S. C. 3761.)

STATEMENT

The facts relating to the single issue in the case may be summarized as follows:

Taxpayer duly filed his individual income tax returns for the calendar years 1938 and 1939, and paid the taxes thereon shown due. (R. 10, 11.) In the return for 1938, taxpayer claimed, among other deductions from income, the amount of $12,959.39 for hurricane loss to landscaped trees, $19,444.10 for insurance premiums paid, and $3,000 for legal fees paid, the last two amounts being claimed as business expenses in connection with taxpayer's interests in a trust estate. (R. 10.) In his return for 1939, taxpayer claimed, among other deductions from income, $4,555.62 for legal fees paid, as a business expense in con-

nection with his interests in a trust estate. (R. 10–11.)

Taxpayer was not engaged in any trade or business in 1938 and 1939. His income consisted almost entirely of distributions received from his father's estate and from two trust funds. (R. 16.)

After substantially all of the claimed deductions were denied by the Bureau of Internal Revenue, conferences were held between taxpayer's representatives and revenue agents and members of the Technical Staff of the Bureau, at which taxpayer's net income for 1938 was first increased to $74,379.87, but later decreased to $67,655.02. In the conference in respect of 1939, taxpayer's income was first increased to $93,909.68, and later decreased to $91,297.16. (R. 10, 11.) In his returns taxpayer had reported net income for 1938 of $40,509.41, and for 1939 of $87,245.93. (R. 10.)

The 1938 final computation resulted from taxpayer's concessions on other disputed items, and the Government's allowance of $8,000 of the claimed hurricane loss. The final figure for 1939 resulted from taxpayer's concession of the issue involving the attorney's fees, and the Government's change of position on the taxable percentage of the Kennecott Copper Corporation's dividends received by taxpayer in 1939. (R. 10, 11.)

Immediately following the final conference between taxpayer and his representatives and the

representatives of the Technical Staff, the head of the Atlantic Division of the Staff, under date of May 5, 1941, transmitted a letter to counsel for taxpayer advising of the acceptance of counsel's proposal for settlement of the tax matters in dispute, and of the consequent recomputation of taxpayer's tax liabilities for 1938 and 1939. With the letter a Form 870–T. S., showing the tax results agreed upon was transmitted, and notification was given that upon taxpayer's execution and return of the form to the Technical Staff, and the Commissioner's approval thereof, a copy of the completed agreement would be returned to taxpayer for his files. (R. 11.)

The printed Form 870–T. S., which was transmitted to taxpayer, was a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax," but it had been modified materially to set forth the agreement arrived at in respect of taxpayer's tax liabilities. First, it provided for acceptance and approval of the amounts of taxes agreed upon by or on behalf of the Commissioner of Internal Revenue, for use "as a basis for closing the case." Second, it provided that if such acceptance and approval was made by the Commissioner of Internal Revenue, "the case shall not be reopened nor shall any claim for refund be filed or prosecuted respecting the taxes for the year(s) above stated, in the absence of fraud, * * * or of an important mistake in mathematical calculations." Third, the printed pro-

vision allowing the Commissioner of Internal Revenue to assess further deficiencies should it subsequently be determined that additional taxes were due, was stricken from the form. (R. 11–13.)

On May 6, 1941, counsel for taxpayer returned the Form 870–T. S. to the Bureau of Internal Revenue, properly signed and dated by taxpayer. Counsel's letter expressed his appreciation, in advance, for putting the matter through to "final completion in as short a time as may be feasible in order to save the running of further interest." The form was formally accepted on behalf of the Commissioner of Internal Revenue on the same date, and on May 7, 1941, taxpayer was advised by letter that his proposal for settlement, incorporated in the form, had been accepted. Detailed computations of the deficiencies agreed upon for 1938 and 1939 were enclosed. (R. 13, 14.) The agreed deficiencies were assessed in May of 1941 and were paid with interest on June 2, 1941. (R. 14.)

Separate claims for refund were filed by taxpayer on November 19, 1942. The claims asserted that certain listed expense items which had previously been claimed in taxpayer's return, but had been the subject of controversy until the agreement of May 5, 1941, was reached, were allowable under the provisions of Section 121 of the Revenue Act of 1942. (R. 14–16.)

On November 12, 1943, the head of the Atlantic Division of the Technical Staff advised taxpayer by letter as follows (R. 15–16):

> In re: Years 1938 and 1939:
>
> Reference is made to claims for refund filed by you for the years 1938 and 1939. This action on your part is contrary to the provisions of agreement, Form 870–TS, executed by you in connection with the closure of the case, under which you bound yourself to take no action for recovery of any part of the taxes for said years.
>
> The closing effected in this case was made in a spirit of concilation and involved the making of concessions on the part of the Government which would not have been made under the situation as it now exists. This office has reexamined the file of the case and is of the opinion that were it not for the fact that the statute of limitations has run against the collection of a further deficiency, this office would be disposed to reopen the case since you are the initiating party. However, since the statute of limitations bars the collection of additional tax, this office concludes to stand by the agreement and insist upon compliance with its terms. * * *

Formal notice of disallowance was transmitted to taxpayer on December 29, 1943. Taxpayer instituted this suit below on December 28, 1945. (R. 16, 1.) The Court of Claims held that the taxpayer is not entitled to recover and that the petition should be dismissed. (R. 27.)

ARGUMENT

1. The taxpayer and his representatives and the representatives of the Commissioner of Internal Revenue worked out a good-faith settlement of taxpayer's tax matters for 1938 and 1939, in May, 1941. Each side made substantial concessions to arrive at the agreed liabilities which were to serve "as a basis for closing the case". The minds of the parties met and the agreement was recorded in writing. The agreement was approved by the Commissioner of Internal Revenue, and the stated tax deficiencies were promptly paid. The case was closed accordingly. It was only after the enactment of the Revenue Act of 1942 that taxpayer undertook to repudiate the settlement.

The findings below leave no room for doubt that the conferees representing both sides were authorized to act as they did, and that all intended to make a final settlement and disposition of taxpayer's tax matters for the years involved; that a settlement was arrived at on a mutually satisfactory basis, and that the settlement was approved, adopted and carried out to the letter; that both parties bound themselves unequivocally not to undertake to reopen the matter in the absence of fraud or major mathematical error. No fraud or mathematical error has been alleged. The executed and approved Form 870–T. S., together with the correspondence currently exchanged, and taxpayer's prompt payment of the stipulated de-

ficiencies, clearly evidenced the agreement and its performance.

The Government agrees with the disposition made of this case by the Court of Claims, which in holding that the taxpayer was barred from maintaining this action, stated as follows (R. 26):

> At the time the agreement in this case was executed the statute had not run on the collection of further deficiencies, but when the claims for refund were filed the statute had run. It would obviously be inequitable to allow the plaintiff to renounce the agreement when the Commissioner cannot be placed in the same position he was when the agreement was executed. A clear case for the application of the doctrine of equitable estoppel exists and should be applied. Cf. *R. H. Stearns Co.* v. *United States,* 291 U. S. 54.

In the *Stearns* case, relied upon by the Court of Claims, Mr. Justice Cardozo's opinion for the Court rejected a contention similar to that made here (291 U. S. at 61–62):

> The applicable principle is fundamental and unquestioned. "He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect 'this is your own act, and therefore you are not damnified.'" [Citations.] Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for

> little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. A suit may not be built on an omission induced by him who sues.

Accord: *Dickerson* v. *Colgrove,* 100 U. S. 578, 580–81; *Ralston Purina Co.* v. *United States,* 58 F. 2d 1065 (C. Cls.), certiorari denied, 289 U. S. 732; cf. *Botany Mills* v. *United States,* 278 U. S. 282 (where no ground for estoppel appeared in the record or was claimed).

2. *Joyce* v. *Gentsch,* 141 F. 2d 891 (C. C. A. 6), is typical of the cases on which petitioner relies to assert a conflict. In that case the Court of Appeals for the Sixth Circuit held that the Commissioner could not show an equitable estoppel because by the very terms of the so-called "settlement agreement" (an unmodified Form 870), the parties did not intend, as in this case, a final definitive settlement of the outstanding tax issues between them. The court said (p. 895):

> * * * by its very terms, an intention not to bind the Government to a final settlement was manifest. The right to assess a further deficiency was expressly reserved. The waiver agreement was, therefore, entirely lacking in essential mutuality.

The other cases relied upon are also distinguishable on their facts. In this case the printed

reservation of the right to assess other and further tax deficiencies was carefully stricken from the modified Form 870–T. S. which was used to evidence the agreement of the parties. See *Baldwin* v. *Higgins* (S. D. N. Y), decided June 23, 1937 (19 A. F. T. R. 1341), affirmed *per curiam,* 100 F. 2d 405 (C. C. A. 2). Cf. *Rubel Corp.* v. *Rasquin,* 43 F. Supp. 111 (E. D. N. Y.), affirmed, 132 F. 2d 640 (C. C. A. 2). Cf. *Bank of New York* (*Estate of Nichols*) v. *United States,* not yet reported, decided by the Court of Appeals for the Third Circuit on August 24, 1948, in which a somewhat different form was used to evidence the agreement between the parties.[1]

3. Taxpayer's asserted right to claim his non-business expenses as deductions from income in this case was created by legislation enacted after the settlement of May 7, 1941. That fact, however, is not material. In *Castell* v. *United States,* 98 F. 2d 88 (C. C. A. 2), certiorari denied, 305 U. S. 652, an alien's representative had signed a release to the Alien Property Custodian for all taxes paid by him during the period the alien's property had been under control of the custodian. Approximately two years later, the Settlement of

[1] The Government has been granted an extension of time to January 21, 1949, within which to apply for certiorari in that case. If the writ in the present case should be granted, the Government may seek review of the *Bank of New York* case in order that the Court may have a more comprehensive basis for review of the problem.

War Claims Act was enacted (March 10, 1928), under which a substantial part of the taxes paid by the Alien Property Custodian on the alien's income would have been recoverable except for the release previously executed. The court said (p. 91):

> It is argued finally that it is contrary to sound public policy to sanction a release by a citizen of future benefits extended by Congress for her relief. We see no sufficient ground for this contention since we can discover no public policy against retaining taxes at rates imposed before the remedial statutes were enacted in cases where the taxpayer has agreed, in return for a valuable consideration, not to take advantage of future tax exemptions. * * *

Cf. *Ross* v. *United States,* 75 F. Supp. 725 (C. Cls.).

Even a tax liability settled on the basis of a statute subsequently declared invalid may not be recovered. *Banker's Reserve Life Co.* v. *United States,* 44 F. 2d 1000 (C. Cls.), certiorari denied, 283 U. S. 836; *Wisconsin Nat. Life Ins. Co.* v. *United States,* 42 F. 2d 316 (C. Cls.). Cf. also *Hord* v. *United States,* 59 F. 2d 125 (C. Cls.).

CONCLUSION

The decision below is correct, and there is no necessity for further review. The petition should be denied.

Respectfully submitted.

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ELLIS N. SLACK,
LEE JACKSON,
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DECEMBER 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 405.

M. ROBERT GUGGENHEIM, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the Court of Claims.

PETITION FOR REHEARING

Of Order of January 10, 1949, Denying Petition for Writ of Certiorari.

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Of Order of January 10, 1949, Denying Petition for Writ of Certiorari.

To the Honorable the Supreme Court of the United States:

The Petition of M. Robert Guggenheim respectfully represents to this Honorable Court that he should be granted a rehearing and a redetermination of the Court's Order, of January 10, 1949, denying his Petition for Writ of Certiorari, based on the grounds hereinafter stated, they being "other substantial grounds available to petitioner although

not previously presented", as referred to in the Court's amendment to its Rule 33, at page 50. Such grounds are:

1. The effect of the conflict, between the instant decision of the Court of Claims and the five Circuit Court decisions (Petition for Certiorari, pp. 7, 8) previously cited, is much more widespread in the field of tax law and its administration than we were able to impress upon the Court in our previous presentation. See discussion of Court of Claims' decision of *this case*—and other related or contradictory cases —in Harvard Law Review, vol. LXI, No. 8 (September, 1948) pp. 1465-1467.

2. The lower courts have not applied consistently this Court's decision and suggestions in *Botany Worsted Mills* v. *United States,* 278 U. S. 282, 289; and an analysis of the Law Review article referred to makes it quite evident that an early settlement of this conflict, on the application of estoppel to tax compromises, is just as important in the administrative affairs of the Government as was a determination, of the "validity of the patents" in the *Schriber-Schroth Co.* case, in the affairs of the automobile industry.

This Court, in *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 305 U. S. 47, 50, cited in Rule 33, amended, p. 50 (upon deciding that "a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit") granted certiorari, *on a petition for rehearing,* in view of "the doubtful validity of the patents" and "reversed and remanded" the case to the Circuit Court (p. 61). The importance of the "validity of the patents" involved in the *Schriber-Schroth* case no doubt was very great in the automobile industry; but it is believed obvious that, throughout the whole country, much greater confusion may be caused by not having declared, as soon as it reasonably may be done, a consistent rule as to when estoppel may or may not properly take tax compromise agreements outside the positive statutory requirement that they should have the approval of the Secretary of the Treasury or of one of his specified assistants.

The discussion of the instant case in the Harvard Law Review (after referring to the Supreme Court's having indicated that solution of this problem—the finality which both parties are seeking in real compromise agreements—through agreements effective from the time of signature "requires strict compliance with the statutory formalities"; and noting the Court's suggestion, in the *Botany Mills Co.* case, that an informal compromise "though not binding in itself, may when executed become, under some circumstances, binding on the parties by estoppel . . . .") states that *"The lower courts have not developed these suggestions with any consistency"* (Emphasis supplied) p. 1467; and proceeds to cite a number of cases.

(*Note 1:* Since we showed a positive conflict between (a) the Court of Claims' decision in the instant case and (b) this Court's decision in the *Botany Mills Co.* case, plus five Circuit Court decisions—in the absence of a proper application of the principle of estoppel—it would seem definitely pertinent (with the "conflict" element thus logically settled in petitioner's favor) to consider whether it is not more important, *or at least as important, in the public interest,* to clarify the confusion and inconsistency now existing, in this field of tax-compromise-waiver-agreement-estoppel situations, as it was to clarify the "doubtful validity of the patents" in the *Schriber-Schroth* case, where the "conflict of decision" element likewise was outside the Court's then immediate consideration because, there, it "was improbable" that such a conflict would arise owing to the concentration of the automobile industry, to which the patent exclusively applied, in one Circuit.)

(*Note 2:* That there was not a proper application of the principle of estoppel by the Court of Claims' decision in the instant case has been shown by analysis and citations of law heretofore, the chief point thereof —that the taxpayer herein did not "prevent" the making of any possible additional assessments against him since *he took no initiative* toward effecting the so-called compromise—having been summarized at pp. 2-5 of Petitioner's Reply Brief by nine (9) references to

places where the *Stearns* decision (*R. H. Stearns Co. v. United States*, 291 U. S. 54, 57-61) had specifically mentioned the initiative there taken by that taxpayer, wherefore he properly was estopped from later taking a different position. *And*, it was the *Stearns* case upon which the Court of Claims herein relied as presumed support for its erroneous view that estoppel should be applied to the instant situation.)

3. That the estoppel element, as applied to this field of the law, has not been well-defined nor consistently interpreted by the courts up to now, is forcefully demonstrated by the Law Review article mentioned, where it says (following the citation of cases which we previously mentioned): "And *the ill-defined doctrine of 'equitable estoppel' offers no better basis for deciding with certainty whether and when a given compromise has become binding upon the taxpayer.*" (Emphasis supplied) p. 1467.

(*Note:* There are two reasons why we now present the emphasizing, by the Law Review article, of the lack of "consistency", in the lower courts' applying of this Court's suggestions in the *Botany Mills* case, as grounds "not previously presented"; and why we did not heretofore "present" some reference to the Harvard Law Review's noticing of this case and the widespread problem which it involves.

(1. The mere fact that the Law Review was contemplating a review of this Court of Claims decision seemed hardly adequate to give as a reason why certiorari should be granted; although we did feel that it tended to show, in some degree, the "general importance" of the issue involved, even though its presentation as a reason at that time might have been a bit unorthodox. We had not received a copy of the article at the time of filing our Petition for Writ of Certiorari and Brief in Support, although copies of our Briefs in the Court of Claims previously had been requested by the editor; but we did have the article some time before filing Petitioner's Reply Brief, herein.

(2. The Law Review article makes a number of incorrect suggestions and statements, which we regretted

having to take the time of this Court to counteract, some of them being:

((a) The suggestion that the *Castell* case (*Castell* v. *United States*, 98 F. 2d 88) might have a bearing on the instant case because it presents a situation where an instrument was "binding as contract or by estoppel". The totally different situation which really was presented by that case is described in Petitioner's Reply Brief, pp. 14, 15.

((b) The statement, that the promissory estoppel doctrine "would seem a more satisfactory ground for reconciling" the Court of Claims' holding in the instant case "with the *Botany Worsted Mills* dictum", is not valid. Basic principles of law pertinent to the facts of the instant case; and also the elemental prerequisites of promissory estoppel prevent such a conclusion from being correct. It is established that a mere promise to do or not to do something in the future cannot work an estoppel unless the promisee has acted to his disadvantage in reliance thereon so that his status has been changed, and there is an element of actual or constructive fraud. *Harvey* v. *J. P. Morgan & Co.*, 2 N.Y.S. 2d 520, 166 Misc. 455. In its exposition of the doctrine of promissory estoppel, Corpus Juris Secundum says: "Of course, a promise cannot be the basis of an estoppel if any other essential element is lacking." 31 C. J. S. 291, Sec. 80. Justifiable reliance and irreparable detriment to the promisee are requisite factors to promissory estoppel. *Robert Gordon Inc.* v. *Ingersoll-Rand Co.*, 117 F. 2d 654.

((c) The statement is incorrect where the article says that, by refraining from additional assessment for 1938 until too late to take such action, "the Commissioner relied to his detriment upon the taxpayer's promise not to claim a refund * * * ". The facts of the instant case do not show that the Commissioner ever had any basis for, nor any real desire nor intent to, make any additional assessment whatsoever against this taxpayer for either of the years involved in the case. See Petitioner's Reply Brief, pp. 11, 12.)

(Regardless of the imperfection of some of its conclusions and the inadequacy of certain of its inferences,

the fact remains that this Harvard Law Review article shows a broad and diligent study of the subject by the man or men who prepared the review; and it should aid materially both in emphasizing the conflict resulting from the instant Court of Claims decision; and in demonstrating the inconsistency between the several courts in their past applications of "the ill-defined doctrine of 'equitable estoppel' " to tax compromises or alleged compromises.)

Wherefore, your petitioner respectfully prays that the above-requested rehearing be granted; that this Honorable Court redetermine its Order of January 10, 1949; and that the writ of certiorari now be granted as heretofore prayed.

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CERTIFICATE OF COUNSEL.

As counsel for the petitioner in the foregoing Petition for Rehearing, I hereby certify that such Petition is presented in good faith and not for delay; and I further certify that the Petition is restricted to the grounds above specified.

Dated this 24th day of January, 1949.

ERRETT G. SMITH,
Counsel for Petitioner.